BEFORE THE ARIZONA CORPORATION COMMISSION

JIM IRVIN
Commissioner-Chairman
RENZ D. JENNINGS
Commissioner
CARL J. KUNASEK
Commissioner

IN THE MATTER OF:

FOREX INVESTMENT SERVICES CORPORATION
2700 North Central Avenue, Suite 1110
Phoenix, Arizona 85004

et al.,

Respondents.

DOCKET NO. S-3177-I

RESPONDENTS' MOTION TO DISMISS RE: LACK OF JURISDICTION AND MOTION TO DISMISS SECURITIES DIVISION'S CLAIM FOR RESTITUTION

I. INTRODUCTION.

In the present matter, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") alleges that the Commission has jurisdiction to regulate transactions in foreign currency. The States, however, have been preempted by Congress from regulating transactions in foreign currency. Thus, the Commission lacks jurisdiction: (1) to require that transactions in foreign currency be registered as securities under Arizona law; (2) to require Respondents to register with the State in connection with these foreign currency transactions; and (3) to initiate proceedings for other alleged violations of the Securities Act of Arizona in connection with transactions in foreign currency.

Further, even if Congress had allowed the States to regulate transactions in foreign currency, the Division's claims for restitution on behalf of certain customers of Eastern Vanguard or FISC have been preempted by the Federal Arbitration Act, because all of those customers agreed to arbitrate any claim that they may have against the Respondents.

II. BACKGROUND.

This case involves foreign currency transactions that occur in the "interbank market." "Most [foreign exchange] trading is executed on the Interbank market. . . ." *Bank Brussels Lambert, S.A. v. Intermetals Corp.*, 779 F. Supp. 741, 750 (S.D.N.Y. 1991). Virtually all trading in foreign currencies in the United States is carried out through an informal network of banks and dealers throughout the world. These participants include large banks, such as CitiBank, or smaller firms such as Frankwell Bullion and Eastern Vanguard. *See Commodities Futures Trading Commission v. Frankwell Bullion*, Ltd., 99 F.3d 299 (9th Cir. 1996).

Moreover, as the parties have stipulated, none of the trades at issue in this matter were executed on an organized trading exchange. (Exhibit S-161; at 6, ll. 2-3.) Rather, the trades were executed by dealing directly with dealers and without making use of any regulated exchange or board of trade. (See Exhibit S-82, deposition of Percy Lung Siu Hung and exhibits thereto.) The United States Supreme Court refers to this market as the "'off-exchange'" or "'over-the counter market.'" *Dunn v. Commodities Futures Trading Commission*, 519 U.S. 465, __, 117 S.Ct 913, 915 (1997).

Regardless of who the participants are in the market, the transactions are basically the same. If a person buys a contract (takes a "long position") in a currency, he believes that the U. S. dollar will weaken against that currency. If he takes a "sell position" (also called a "short position"), he anticipates that the U. S. dollar will gain against that foreign currency. To close a transaction, and to take either a profit or a loss, a transaction is executed that reverses the prior long or short position in the foreign currency. *See Bank Brussels Lambert, S.A., v. Intermetals Corporation*, 779 F. Supp. 741, 743 (S.D.N.Y. 1991). For example, a person may open a trade with a "buy" position for two contracts for British

Pounds (Sterling) at a market price of 1.5000 and close the trade with a "sell" position for two contracts at a market price of 1.5080.[1]

The forex market is worldwide. The market values for the various currencies are obtained through computer services that provide instantaneous details of currency transactions around the world, including TeleRate (a service of Dow Jones) and Reuters. Eastern Vanguard Forex participates in this interbank market to buy and sell foreign currency contracts for customers worldwide.

The Division alleges that the Commission is empowered to regulate the foreign currency transactions handled by Eastern Vanguard, claiming that such transactions are "commodity investment contracts," which the Securities Act of Arizona defines to be securities. Thus, the Division claims that foreign currency transactions on the interbank market are subject to the Securities Act of Arizona, including the registration and antifraud provisions of the Act.

As shown below, Congress amended the Commodities Exchange Act in 1974 to specifically exclude regulation of off-exchange transactions in foreign currency. Congress created the Commodities Futures Trading Commission ("CFTC") to develop the expertise to regulate commodities trading and gave the CFTC broad, extensive, and exclusive jurisdiction over investments involving commodities. As these changes were being considered, Congress agreed with the Treasury Department that transactions in foreign currency, especially those that were part of the interbank market, should be excluded from regulation out of concern that those markets should not be burdened with additional regulation. This amendment to the CEA is known as the "Treasury Amendment." Recent decisions from the United States Supreme Court and the Court of Appeals for the Ninth Circuit hold that

[1] In this example, the customer would make a profit of $860 calculated as follows:
profit = (closing price – opening price) X (value in Pounds of each contract) X (number of contracts)
profit = (1.5080 – 1.5000) X 62,500 X 2 = $1,000
The net profit after commission would be $1,000 - $140 = $860.

the Treasury Amendment does not permit regulation of the currency trading that is the subject of the Division's Notice in this matter. *Dunn*, 117 S.Ct 913; *Commodities Futures Trading Commission v. Frankwell Bullion, Ltd.*, 99 F.3d 299 (9th Cir. 1996).

Despite the clear mandate of the Supreme Court and the ninth circuit, the Division nevertheless contends that the Commission has the right to regulate foreign currency transactions even though Congress expressly declared that the CFTC, the agency with the expertise and broadest jurisdiction over commodities investments, does not have that right. As shown below, the Commission is preempted from exercising jurisdiction over the foreign currency transactions in this case, and the claims against the Respondents should be dismissed.

III. THE COMMODITIES EXCHANGE ACT DOES NOT PERMIT STATE OR FEDERAL REGULATION OF OFF-EXCHANGE FOREIGN CURRENCY TRADING.

A. The CEA Expressly Excludes Regulation of Off-Exchange Transactions in Foreign Currency.

In 1974, Congress substantially changed how commodities were to be regulated when it amended the Commodities Exchange Act, 7 U.S.C. § 1, *et seq.* ("the CEA"). The CEA created the CFTC, and gave it exclusive jurisdiction over the regulation of commodities. 7 U.S.C. § 2. All commodities trading was to be accomplished on exchanges, and regulated by the CFTC.

The proposed 1974 amendments to the CEA allowed the CFTC to regulate transactions involving foreign currency, including the type of transactions involved in this case. As the Senate Agricultural Committee pondered this legislation, the Department of the Treasury expressed concern that regulation of off-exchange transactions in foreign currencies could inhibit those markets and reduce their efficiency. The Treasury Department further stated that it would be inappropriate to add additional regulation to a highly complex and actively traded international market:

> The [Treasury] Department feels strongly that foreign exchange futures trading, other than on organized exchanges, should not be regulated by the new agency. ***Virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements.***

S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), reprinted in 1974 U.S.C.C.A.N. 5843, 5887-89, n. 3 (emphasis added). The Treasury Department concluded by expressing its concern that "new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." *Id.* at 51.

The Treasury Department convinced Congress that protecting foreign currency markets from unnecessary regulation was necessary, and Congress adopted the exemption proposed by the Treasury Department to exclude off-exchange foreign currency transactions from regulation. This exemption became known as the "Treasury Amendment" to the CEA:

> ... Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, ... unless such transactions involve the sale thereof for future delivery conducted on a board of trade ....

7 U.S.C. §2. The Treasury Amendment remains unchanged despite several other amendments to the CEA.

B. The Transactions in This Case Fall Within the Scope of The Treasury Amendment.

Both the United States Supreme Court and the Court of Appeals for the Ninth Circuit have recently interpreted the Treasury Amendment to prohibit regulation of off-exchange foreign currency trading. *Dunn*, 117 S.Ct 913; *Frankwell Bullion*, 99 F.3d 299. In *Frankwell*, the CFTC and the California Corporations Commission sued Frankwell, a foreign currency firm that handled the same type of foreign currency contracts that are involved here. *Id.* Frankwell was a Hong Kong corporation that offered foreign currency transactions to the general public through several American-based affiliates. *Id.* at 300.

As Eastern Vanguard does here, Frankwell sold standardized lots of certain currencies in which the customer could either open a "long" or a "short" position at a price based on the Interbank spot market. *Id.* Frankwell's customers deposited a margin of $1,000 to $2,000 for each lot purchased, with additional margin required in the event of adverse market conditions. *Id.* Customers were neither required to pay the full purchase price for the currency nor obligated to accept delivery of the currency.. *Id.* Instead, the customers would take profits or losses when a position was closed with an offsetting contract. *Id.* Customers also paid a carrying charge for each day that a contract was left open. *Id.* at 301.

The CFTC argued that the Treasury Amendment exempted only off-exchange trades between banks and sophisticated parties, and not trades involving individual customers. *Id.* The court noted the Treasury Department's repeated and explicit description of the Treasury Amendment as excluding all transactions in foreign currency other than those on "organized exchanges," and not just interbank transactions. *Id.* at 303. The court held that Congress intended to exclude all off-exchange transactions from regulation. *Id.*

The court also rejected the argument that Frankwell was a "board of trade" because it was an association of persons engaged in the business of selling commodities. *Id.* a 303-04. It held that Congress intended a narrow definition of "board of trade" in the Treasury Amendment. *Id.* at 304. *Frankwell* also rejected the distinction attempted by other courts[2] between "sophisticated investors" and the "general public" because there is no support in the statutory language for this distinction, and no

[2] The court in *Rosner v. Emperor International Exchange Co.*, 1998 U.S. Dist. LEXIS 7353 (S.D.N.Y. 1998), followed a pre-*Dunn* case, *CFTC v. Standard Forex, Inc.*, 1993 U.S. Dist. LEXIS 19909 (E.D.N.Y. 1993), and held that the CEA applied to off-exchange transactions with unsophisticated customers. *Rosner* is contrary to an earlier decision from the same district as the *Rosner* court. *See Kwiatkowski v. Bear Stearns Co., Inc.*, Comm. Fut. L. Rep. (CCH) par. 27,224, 1997 U.S. Dist. LEXIS 13078 (S.D.N.Y. 1997). *Rosner* ignored *Dunn's* rationale that Congress intended to exempt all off-exchange transactions in foreign currency from CFTC regulation. *Rosner* did not address the holding in *Frankwell*, except to disagree with it. Further, the ninth circuit's mandate in *Frankwell* stands in marked contrast to the splintered Eastern District of New York. *Frankwell* is the law in the Ninth Circuit—where the federal laws applicable to this case are interpreted—and should be followed.

assistance as to how such a distinction should be drawn. *Id.* Thus, the claims against Frankwell were dismissed.

The CFTC was also unable to convince the Supreme Court that the scope of the Treasury Amendment should be narrowly construed. In *Dunn*, the Court held that Congress had not authorized the CFTC to regulate off-exchange trading in options to buy or sell foreign currency. 117 S.Ct. at 918.

In *Dunn*, the CFTC brought suit against individuals and companies which traded in options in foreign currency. *Id.* at 915. Petitioners, like Respondents here, were small firms that handled foreign currency-related transactions. *Id.* The Court interpreted the Treasury Amendment expansively, and held that the phrase "transactions in foreign currency" included transactions in options to buy or sell foreign currency, and that sales of options were exempt from CFTC regulation. *Id.* The Court held that the Treasury Amendment provides a general exemption from CFTC regulation for off-exchange foreign currency trading, which had previously developed free from supervision under the commodities laws. *Id.* at 917. The Court held that the Treasury Amendment removed all off-exchange transactions relating to foreign currency from the reach of the CEA. *Id.* at 918. The Court stated that the Treasury Amendment's exemption of off-exchange transactions in foreign currency trading was "***a complete exclusion of that commodity from the regulatory scheme***." *Id.* at 918 (emphasis added).

Similarly, in *Bank Brussels Lambert, S.A. v. Intermetals Corp.*, 779 F. Supp. 741 (S.D.N.Y. 1991), the defendant engaged in speculative trading in the spot market for foreign currency through its bank. It posted losses of over a million dollars, and the bank sued. Defendant claimed the trades were illegal because they did not conform to the CEA and its regulations. The court rejected that claim. In spite of defendant's argument that the positions were rolled over successively and that the transactions were solely for speculation, the court held that the Treasury Amendment clearly exempted transactions in

foreign currency from CEA coverage, and that imposition of regulatory laws would wreak havoc on the free market-dependent world of foreign currency exchange:

> I know further that to rule in accordance with [defendant's] argument would bring about an enormous upheaval in foreign exchange trading. As the CFTC's report indicates, "Most [foreign exchange] trading is executed on the Interbank market, and not on CFTC-regulated exchanges. There is every reason to believe that large portions of such trading is speculative, with traders using rollovers to perpetuate positions and offsetting transactions to close them out, rather than taking delivery of foreign currencies. The CFTC report makes no suggestion that such trading is illegal. If the ruling advocated by [defendant] represented the law, this enormous market would be illegal for failure to conform to the requirements of Section 6."

Id. at 750.

See also Kwiatkowski v. Bear Stearns Co., Inc., Comm. Fut. L. Rep. (CCH) par. 27,224, 1997 U.S. Dist. LEXIS 13078 (S.D.N.Y. 1997) (investor's claim for violation of CEA dismissed because transaction in foreign currency through private Forex trader, in individual investor's account, were exempt from coverage of the CEA by the Treasury Amendment).

Accordingly, the Treasury Amendment applies to the transactions in this case, and the Commission is preempted from regulating those transactions.

C. The CEA Negatively Preempts the Commission From Regulating Transactions in Foreign Currency.

As the above discussion demonstrates, Congress has specifically prohibited the CFTC from regulating transactions in foreign currency. Congress' mandate to the CFTC must logically be construed to extend to the states. Under the doctrine of negative preemption, the very fact that Congress has not regulated certain activity in a subject matter manifests an intent that the activity should not be regulated by the states. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S. Ct. 988, 55 L.Ed. 2d 179 (1978), the Court recognized that

> where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use

their police power to enact such a regulation. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 US 767, 774 (1947); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

In *Ray*, the Court considered whether Congress, through its comprehensive regulation of oil tankers, had preempted states from imposing stricter safety and design standards on those same tankers. The state statute at issue prohibited vessels larger than a specified size from entering Puget Sound under any circumstances. The state statute was not inconsistent with the federal statute, which had no size limitation. The Court inferred a Congressional intent to preempt state law because the statutory pattern showed that Congress intended uniform national standards that would foreclose the imposition of more stringent requirements. *Id.* at 163-68. The Court found that the failure of the federal agency to promulgate a ban on the operations of oil tankers in excess of a certain size in Puget Sound was tantamount to ruling that no such regulation should be enacted.

In *Norfolk & Western Railway Co. v. Public Utilities Comm. Of Ohio*, 926 F.2d 567 (6th Cir. 1991), a state issued regulations requiring a railroad to install walkways and railings on bridges. The railway argued that the state was preempted from issuing such regulations. The state relied on a provision of the federal law that allowed the state to adopt any "standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 926 F.2d at 570, *quoting, in part*, 45 U.S.C. §434. The state argued that because the applicable federal law governing the railroad did not mention safety standards for bridges that the state had the right to set safety requirements for the bridges. The court ruled that the railroad's response was correct:

> the railroad responds that the agency's explicit refusal to adopt a regulation requiring railroad bridge walkways was a determination that a regulation requiring bridge walkways was not appropriate, and thus amounted to negative preemption. We agree.
>
> * * * *

> We conclude, therefore, that Ohio's regulation concerning walkways on railway bridges and trestles is preempted by 45 U.S.C. §434. The FRA has purposely declined to implement a national regulation requiring railroad walkways on bridges. Thus, [the Public Utilities Commission of Ohio] is preempted from issuing such a regulation.

926 F.2d at 570-72.

Similarly, in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed. 2d 396 (1976), the Court held that the negative preemption doctrine applied to invalidate a Wisconsin labor law that outlawed activity not regulated by the National Labor Relations Act. The Court held that Congress, which had the power to regulate the conduct, had intended to leave it unregulated:

> [T]he failure of Congress to prohibit certain conduct warrant[s a] negative inference that it was deemed proper, indeed desirable – at least, desirable to be left for the free play of contending economic forces. Thus, the state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.

Id., 427 U.S. 141, n. 4, *quoting Lesnick, "Preemption Reconsidered: The Apparent Reaffirmation of Garmon,"* 72 Col. L. Rev. 469, 478, 480 (1972). The Court found that Congress intended both labor and management to have the ability to apply whatever economic pressure they had against the other side during the course of labor negotiations. By failing to regulate such pressure, Congress did not intend any state or federal regulatory agency to have the right to fill that vacuum. "The Court had earlier recognized in preemption cases that Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces." *Id.* at 144. The "inevitable result" of allowing state regulation "would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 146.

Like the lack of federal regulation in the tanker law at issue in *Ray*, the safety regulations in *Norfolk & Western*, and the labor law issues in *Lodge 76,* the lack of CFTC regulation of foreign currency trading does not give states the green light to fill that void. Rather, Congress, at the bequest of the Treasury Department, specifically determined not to regulate transactions in foreign currency. As the Court held in *Lodge 76*, above, by failing to regulate these transactions, Congress did not intend any state or federal agency to fill that vacuum, but intended the transactions to be "controlled by the free play of economic forces."

Most cases involving negative preemption question whether Congress ***implicitly*** intended not to regulate certain activity by not mentioning it in an otherwise extensive regulatory scheme. The case for negative preemption here is stronger than usual because Congress ***expressly*** stated through the Treasury Amendment that it did not want any regulation over foreign currency transactions except for that provided through the Treasury Department.

Accordingly, the Commission is preempted from exercising jurisdiction over transactions protected by the Treasury Amendment.

IV. 1983 AMENDMENTS TO THE CEA ALLOWING SOME STATE JURISDICTION OVER FRAUD DID NOT AFFECT THE TREASURY AMENDMENT PROHIBITION ON REGULATION OF TRANSACTIONS IN FOREIGN EXCHANGE.

In 1974, when the CEA was initially passed, it gave the CFTC exclusive jurisdiction over the regulation of commodities. 7 U.S.C. §2. In 1983, Congress amended the CEA to permit states to supplement the CFTC's regulation of commodities in certain contexts:

> Nothing in this chapter shall supersede or preempt—
>
> * * * *
>
> (2) the application of any Federal or State statute, including any rule or regulation thereunder, to any transaction in or involving any commodity,

> ... (A) that is not conducted on or subject to the rules of a contract market ....

7 U.S.C. § 16(e). As a result of this amendment, the CEA no longer preempts state or other federal regulation in limited contexts. State law may be applied to transactions in commodities that are not conducted on or subject to the rules of a contract market, board of trade, exchange, or market located outside the United States. Hence, state officials could apply state or federal law to attack commodities fraud in certain transactions. *See CFTC v. American Metals Exchange Corp.*, 991 F.2d 71 (3d Cir. 1993).

The legislative history of this provision shows that it was passed to allow state agencies to help the CFTC battle commodities fraud. In *CFTC v. American Metals Exchange Corp.*, 991 F.2d 71 (3d Cir. 1993), for example, two states' securities agencies joined with the CFTC to prosecute fraud in the sale of gold under both the CEA and those states' securities statutes. The power of the states to regulate commodities investments is still limited, however. In fact, §16(e) states that the CFTC can identify transactions that the states will not be permitted to police, including transactions where the CFTC has determined should be exempt from regulation under the CEA.

§16(e) is silent as to whether it applies to the foreign currency transactions specifically excluded from regulation by the Treasury Amendment. The Division may attempt to argue that §16(e) trumps the Treasury Amendment and gives the Commission the authority to regulate foreign currency transactions. An elementary canon of statutory construction, however, provides that a statute should be interpreted so as not to render one part inoperable. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Anna*, 472 U.S. 237, 249 (1985). In interpreting a statute, a court must be not be guided by a single sentence or "member of a sentence," but must look to the provisions of the whole law and to its object and policy. *United States National Bank of Oregon v. Independent Insurance Agents of America, et al.*, 508 U.S. 439, 455 (1993). A "more natural" reading of a statute, which gives effect to all of its provisions, always prevails over a suggestion to disregard or ignore a duly enacted law as legislative

oversight. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

Applying the above principles of statutory construction, it is evident that Congress determined that off-exchange transactions in foreign currency should not be subject to regulation under the CEA. §16(e) does not refer to or purport to overrule the Treasury Amendment. The 1983 amendment allowing states some policing authority over off-exchange commodities transactions did not alter the Treasury Amendment's clear exemption for off-exchange transactions in foreign currency. To allow such a reading would render the Treasury Amendment inoperable, and would allow a limited exemption to swallow the Treasury Amendment. *See Mountain States Telephone & Telegraph Co.,* 472 U.S. at 249.

The history of the Treasury Amendment mandates that §16(e) cannot be construed so as to negate it. Congress initially attempted to bring a broad array of transactions into the grasp of the CEA, but specifically exempted transactions in foreign currency from regulation. The congressional intent was clear—if transactions in foreign trade were to be regulated by any agency, that regulation should come from the Treasury Department. The fact that Congress later allowed states to police certain off-exchange commodities transactions previously reserved for exclusive CFTC control does not mean that states were suddenly given power to regulate foreign currency transactions subject to the Treasury Amendment. The CFTC was not empowered to control those transactions, and the transfer and sharing of jurisdiction between the CFTC and the States did not include the transfer or sharing of jurisdiction over transactions in foreign currency. It would be illogical to interpret Congressional intent as subjecting foreign currency transactions to state regulation when Congress (and the Supreme Court) determined that the CFTC—the agency with the greatest expertise in regulating commodities investments—should not be permitted to do so. Neither the CFTC nor the Commission have the right to regulate foreign currency transactions, and the Division's claims against the Respondents should be dismissed.

V. CONGRESS PREEMPTED, THROUGH THE FEDERAL ARBITRATION ACT, THE STATE'S ACTION FOR RESTITUTION.

The Division seeks restitution on behalf of certain customers: "The Division requests that the Commission ... [o]rder all Respondents to take affirmative action to correct the conditions resulting from their acts, practices, or transactions, ***including*** without limitation ***a requirement to make restitution*** pursuant to, inter alia, A.R.S. § 44-2032." Notice of Opportunity for Hearing Regarding Proposed Order for Relief at 12, 3 (emphasis added).

Each customer for whom the Division is seeking restitution signed an agreement with Eastern Vanguard containing an arbitration clause:

> EVF has the right at its sole election to refer any dispute arising from or relating to this agreement or to any transaction/s contract effected hereunder to arbitration in accordance with the rules or regulations of EVF and/or other appropriate bodies.

(*See, e.g.,* Exhibits S-54-60.) After the Division filed this action, Respondents sent letters to each customer demanding arbitration of any claims that they might have against the Respondents. (Exhibit S-81a, b.) All but one of the customers received a letter.[3] (*Id.*) All of the customers elected to have the Division pursue potential claims on their behalf in this proceeding.

Arbitration clauses are to be construed liberally and in favor of arbitration:

> The [Federal Arbitration Act] provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2.* The FAA not only reversed the judicial hostility to the enforcement of arbitration contracts, but also created a rule of contract construction favoring arbitration. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24-25, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (FAA manifests a "liberal federal policy favoring arbitration agreements"); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)* ("any

[3] Presumably, the Division has also notified the customers of this proceeding.

> doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

Kuehner v. Dickison & Co., 84 F.3d 316, 319 (9th Cir. 1996).

Congress has mandated that arbitration clauses should be enforced:

> a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. This statute is enforceable even when the governmental claims are statutory based, as they are here.

In *Olde Discount Corporation v. Tupman*, 1 F.3d 202 (3rd Cir. 1993), a brokerage firm sued to enjoin state officials and others from pursuing a rescission action before a state securities commissioner. In that case, as in this one, the customers had signed agreements requiring them to submit all claims "arising out of the relationship established by this agreement" to arbitration. *Id.* at 204. The court held that the state's action to enforce its Securities Act would undermine the plaintiff's right to arbitrate. It held that the FAA pre-empted state law authorizing state officials to pursue securities fraud claims. The state's right to pursue a rescission remedy before an administrative tribunal, it reasoned, conflicted with the congressional purpose underlying the FAA: "The Supreme Court unstintingly has promoted a favorable climate for arbitration through vigorous enforcement of the FAA over the last 20 years." *Id.* at 208. Specifically, it noted that the Supreme Court has favored the right to arbitrate over the right to litigate in securities matters, beginning with *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed. 2d 185 (1987).

The court rejected the state's argument that it should be able to pursue equitable relief and remedies—like the restitution sought by the Director of Securities here—for the benefit of the public interest. Because individual customers could not have pursued those remedies in court but were required

to arbitrate, the state could not pursue those own remedies in its own name, and the maintenance of the state administrative proceeding was "an obstacle to Congress' purpose in adopting the FAA." *Id.* at 209.

Likewise, the claims for restitution on brought behalf of Respondents' customers should be dismissed so that they can be arbitrated. The customers signed arbitration agreements, and any claim seeking recovery for those customers—regardless of the label given to the claim—must be arbitrated.

V. CONCLUSION

The Commission lacks jurisdiction over foreign currency trading. Accordingly, the Notice, which alleges that Respondents engaged in leveraged foreign currency trading, must be dismissed with prejudice. Assuming arguendo that the Division has jurisdiction over this matter, the pre-dispute arbitration clauses found in the customer's agreements preempt any claim by the Division for restitution on behalf of the customers. The Division's claims for restitution must thus be dismissed with prejudice.

DATED this 25th day of November, 1998.

ROSHKA HEYMAN & DEWULF, PLC

By _____

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